CHENG SWEE FOO & ANOR. v. SHAW BROS. LTD.

[D.C.A. (Chua J.) February 2, 1982]

[Singapore – District Court Appeal No. 1 of 1982]

Landlord & Tenant – Rent-controlled premises – Claim for possession of shop premises against tenant – Sale of business by tenant to another – Whether this amounted to parting of possession and therefore breach of covenant by tenant – Control of Rent Act (Cap. 266), s. 15(1)(b).

The plaintiffs as landlords claimed possession of a rent-controlled shop premises from the defendant Cheng Swee Foo on the ground that the defendant had committed a breach of covenant by parting with possession of the said premises to Swee Lee & Co. The plaintiffs also claimed possession of the said premises from Swee Lee & Co., the second defendant in the suit, on the ground that they were trespassers unlawfully in occupation.

The facts showed that the defendant was granted a monthly tenancy of the said premises on December 12, 1947. It was a condition of the tenancy that the defendant would not sub-let or part with possession of the said premises without the consent of the landlords. At the time of the grant of the said tenancy, the defendant was the sole proprietor of Swee Lee & Co.

On January 29, 1980 the defendant wrote to the plaintiffs applying for the plaintiffs' consent for the defendant to part with possession of the said premises as he intended to sell his business of Swee Lee & Co. to his daughter and six of his employees, and assign the tenancy of the said premises to the said purchasers. The plaintiffs did not give their consent.

On April 15, 1980, the defendant sold Swee Lee & Co and transferred all the goodwill and assets of the firm to the purchasers for $1.2 million. The purchasers appointed the defendant as manager of the firm. The purchasers became partners of the firm on January 1, 1980. The defendant was in possession of the keys to the said premises at all material times and continued to pay the telephone bills, the rent etc. from the firm's account. The Public Utilities Board account in respect of the said premises was still in the defendant's name.

The learned District Judge held that the defendant had parted with possession of the said premises to the purchasers and had thus committed a breach of the tenancy agreement. The defendant appealed.

Held, dismissing the appeal: the learned District Judge was right in his decision to make an Order for possession against the appellant.

Cases referred to:

(1) *Peebles* v. *Crosthwaite* (1897) 13 T.L.R. 198
(2) *Chaplin* v. *Smith* [1926] 1 K.B. 198
(3) *Lam Kee Ying* v. *Lam Shes Tong* [1975] A.C. 247; [1974] 2 M.L.J. 83.

DISTRICT COURT APPEAL.

Lim Teck Hui for the appellant.
Kirpal Singh for the respondent.

Cur. Adv. Vult.

Chua J.: This is an appeal arising from a judgment of the District Court giving judgment for the respondents (plaintiffs) against the appellant Cheng Swee Foo (defendant) for the possession of the shop premises known as No. 161 North Bridge Road, Singapore (the said premises).

The plaintiffs as landlords claim possession of the said premises from the defendant Cheng Swee Foo on the ground that the defendant had committed a breach of covenant by parting with possession of the said premises to Swee Lee Co.

The plaintiffs also claim possession of the said premises from Swee Lee Co. (the second defendant in the suit) on the ground that they are trespassers unlawfully in occupation.

It is not in dispute that the said premises are rent-controlled premises to which the provisions of the Control of Rent Act (Cap 266) applies.

These short facts are not in dispute. By an agreement in writing dated December 12, 1947, the defendant was granted a monthly tenancy of the said premises. It was a condition of the tenancy, *inter alia,* that the defendant would not sub-let or part with possession of the said premises or any part thereof without the consent of the landlords. At the time of the grant of the said tenancy, the defendant was the sole proprietor of Swee Lee Co.

On Janury 29, 1980, the defendant, through his solicitors, wrote to the plaintiffs' solicitors, applying for the plaintiffs' consent for the defendant to part with possession of the said premises as he intended to sell his business of Swee Lee Co. to his daughter and six of his employees and assign the tenancy of the said premises to the said purchasers. On February 4, 1980, the plaintiffs informed the solicitors of the defendant that they were unable to give the consent the defendant sought.

The defendant, on the advice of his solicitors, caused an agreement to be drafted, and on April 15, 1980, the defendant and the seven purchasers

executed the said agreement. The material terms of this agreement are as follows: –

(1) The business of Swee Lee Co. was sold by the defendant to the purchasers for a sum of $1.2 million, which was payable by 60 equal monthly instalments. The defendant transferred all the goodwill and assets of the firm to the purchasers. (clauses 1, 2 and 5).

(2) The purchasers acquired all rights of the firm Swee Lee Co. to the exclusion of the defendant and the profit and loss of the firm belong to and are borne by the purchasers (clauses 1 and 3).

(3) Until the whole of the purchase price of $1.2 million had been paid in full, the defendant would "continue to carry on the said business as manager (as if he had not sold his said business to the purchasers) with full authority and power to negotiate and to deal with the principals of the firm's agencies in all kinds of musical organs and instruments and sales or purchases or any contract in connection with the firm's business." The purchasers appointed the defendant as manager with all the powers and authority aforesaid and it was declared that this appointment shall be irrevocable for a period of five years with effect from February 1, 1980, and until the whole of the purchase price had been fully paid and settled (clause 8).

(4) As manager of the firm, the defendant was entitled to such remuneration and allowances as shall be fixed by the defendant himself (clause 10).

In his evidence the defendant said that pursuant to this clause he drew a salary of $3000 p.m. from the firm and no other sum.

(5) If there is (a) any discord or (b) any breach of any condition in the agreement by the purchasers, or (c) if the purchasers, in the opinion of the defendant, have proved to be incapable of running the business of the firm with success or (d) if, in the sole opinion of the defendant, the firm has been mismanaged due to lack of industry, frequent or irreconcilable disputes or non-co-operation among the purchasers or between any of the purchasers with the defendant, then the defendant shall be entitled to call off the sale and purchase and rescind and cancel the contract herein entered between himself and the purchasers without assigning any reason whatsoever (clause 9).

(6) The purchasers agreed that they have become partners of the firm with effect from January 1, 1980, (clause 12).

The defendant was and is in possession of the keys to the said premises at all material times. He continues to pay the telephone bills, the rents and other expenses from the firm's account. The PUB account in respect of the said premises is still in the defendant's name.

At or about the same time an escrow was also executed between the defendant and the said purchasers whereby the business of Swee Lee Co. was resold to the defendant at such price equivalent to the instalments paid by the purchasers.

On April 23, 1980, formal documents were registered with the Registry of Businesses showing that the defendant had withdrawn from the firm of Swee Lee Co. on January 1, 1980, and that the purchasers had taken over the business as partners with effect from the same date. In the formal documents the defendant was shown as the person responsible in the management of the business.

The only issue for determination by the District Judge was, whether, on the undisputed facts, there had been a parting of possession by the defendant which amounted to a breach of covenant by him entitling the plaintiffs to an order for possession under Section 15(1)(b) of the said Act.

The District Judge held that the defendant had parted with possession of the said premises to the purchasers and had thus committed a breach of the tenancy agreement. The District Judge considered it reasonable that an order for possession should be made against the defendant as the said premises had been let to him for his own use and occupation and he is not now using it but was allowing another to have possession of it. In respect of the second defendant, Swee Lee Co., there was no dispute that the defendant was prohibited from parting with possession of the said premises to them and accordingly the District Judge was of the view that the order of possession should be enforceable against them also. Judgment was accordingly entered for the plaintiffs with costs.

Only the defendant has appealed.

The main ground of appeal is that the District Judge erred in holding that there was a parting with possession of the said premises by the appellant.

It is contended on behalf of the appellant that the sale agreement was only a sale of the business and goodwill of the firm and that the tenancy was not involved. Counsel submitted that the appellant is in full control of the business and is in exclusive possession of the said premises. If he should buy back the business the appellant would need the said premises and has not parted with possession of the said premises.

Counsel for the appellant submitted that a covenant which forbids a parting with possession is not broken by a lessee who in law retains the possession even though he allows another to use and occupy the premises. He cited the cases of *Peebles* v. *Crosthwaite*[1], *Chaplin* v. *Smith*[2], and *Lam Kee Ying* v. *Lam Shes Tong*[3], in support.

The short facts in *Peebles* v. *Crosthwaite* were these. Peebles took from the defendants' predecessors in title a lease of certain premises. The lease contained a proviso for re-entry by the lessors in case of a breach of the lessee's covenants and one of those covenants was that he, his executors, administrators, or assign would not "assign, underlet, or part with the possession of the demised premises" without the previous licence in writing of the lessors. Peebles carried on business as a paper maker and paper agent at the demised premised. Peebles commenced an action against the defendant for an injunction to restrain the defendant from interfering with the right of way granted by the lease. Peebles died after the commencement of the action, which was afterwards continued by his executors. After Peebles' death his executors sold the premises and business to a limited company called A.M. Peebles & Son (Ltd.). The stock was delivered to the company, which put its name up on the demised premises, these premises being also its registered office. The property was not assigned to the company and no licence to assign or part with the possession was obtained from the lessors. The defendant contended that the covenant in the lease had been broken entitling the defendant to determine the lease. On the construction of the agreement the trial Judge held that the sale, so far as regard this portion of the property sold, was not completed. The executors had a large shareholding in the new company, and two of them were directors of it, who attended at the premises and took part in the management of the company's business. The trial Judge held that there had been no breach of the lessee's covenant, inasmuch as the executors had never parted with the possession of the demised premises. This was upheld on appeal.

In the case of *Chaplin* v. *Smith*, the lessee had covenanted with his lessor that he would not assign or underlet or part with possession of the demised premises or any part thereof. He assigned his business, that of a motor garage proprietor, to a company of which he was the managing director and in which he held a controlling interest. He carried on the business of the company on the premises which were the registered office of the company. He kept the key of the premises in his possession. The company agreed to indemnify him in respect of rates and taxes. Subsequently a second company was formed, of which the lessee was the managing director, and which took over the business, assets and liabilities of the first company. In negotiating for this transfer the lessee stipulated that he should remain in possession as actual tenant of the demised premises and his co-director agreed. It was held that no interest in the demised premises had passed to the companies or either of them, and that there had been no breach of the lessee's covenant not to part with possession of the premises or any part thereof.

These two cases cited by counsel for the appellant can be distinguished from the present case and are of no assistance to the appellant. In the two cases cited the lessees had retained a controlling interest in the companies which took over their business at the demised premises whilst in our case the appellant had effectively divested himself of all interest in Swee Lee Co. to which he sold his entire business for $1.2 million. Although the appellant retained the keys to the premises, he was there only as an employee of the firm (as Manager) and the rents, telephone bills and PUB bills are paid by Swee Lee Co.

If the intention had been that the appellant would retain the tenancy it would have been an easy matter to say so as was done in the case of *Chaplin* v. *Smith*. It is inconceivable that the purchasers would pay $1.2 million if the intention was that the appellant was to retain the tenancy of the premises.

In *Lam Kee Ying* v. *Lam Shes Tong*, the landlord was the proprietor of premises in Kuala Lumpur which had been demised by a predecessor in title to the tenant for a term of 25 years. The lease contained a covenant not to part with the possession of the demised premises or any part thereof without the prior written consent of the lessor, and to use the demised premises for carrying on a business as general merchants whether trading as a sole proprietor or in partnership. The tenant carried a business from the premises trading in partnership with others. On June 30, 1969, the tenant and his partners agreed to form a limited company for the purpose of acquiring as a going concern the business carried on by the partnership. During the latter half of 1969 the supply of electricity and water to the partnership was dis-

continued and fresh agreements were made for their supply to the company. The telephone service was also put into the name of the company and a signboard bearing the company's name was erected outside the premises. Receipts, bills and invoices were issued in the name of the company. On November 1, 1969, a cheque drawn by the company was tendered to the landlord as payment for rent of the premises. This brought to the knowledge of the landlord that the company was occupying the premises, and on December 24, 1969, the landlord commenced an action in the High Court in Malaya claiming possession of the premises for breach of the covenant not to part with possession naming the tenant and the company as defendants. Both defendants denied any breach of covenant. The trial Judge found that the tenant had parted with possession in breach of covenant to the company and made an order for delivery of possession to the landlord. The tenant and the company appealed to the Federal Court which allowed their appeals holding that although let into occupation by leave and licence of the tenant the company had not been given possession. The Federal Court further held that the case was one in which equitable relief from forfeiture should be granted. The landlord appealed to the Privy Council. It was held that the proper conclusion to be drawn from the evidence was that the tenant had not merely permitted the company to use the premises but had parted with possession of the premises to the company, and, accordingly, he was in breach of covenant. However, the Privy Council held that the Federal Court had properly exercised its jurisdiction under Section 237 of the National Land Code to grant such relief and dismissed the appeal.

The Privy Council made a distinction between the case before them and the two cases of *Peebles* v. *Crosthwaite* and *Chaplin* v. *Smith*. In delivering the judgment of the Board, Sir Harry Gibbs said (page 256):

"However, the question whether the first respondent has parted with possession must depend upon all the facts and circumstances of the present case which in their Lordships' opinion are distinguishable from those of the cases cited. Some of the evidence – as to the erection of the signboard, the transfer of the electricity, water supply and telephone and the issue of receipts, bills and invoices in the name of the second respondent – is equivocal and is quite consistent with a conclusion that although the second respondent occupied the premises the first respondent retained possession. However the fact that the second respondent tendered its own cheque in payment of the rent is some evidence that the second respondent regarded itself and was regarded by the first respondent, as having possession of the premises."

The Privy Council concluded that there had been a parting of possession although the tenant held more than 50% of the total paid-up capital of the company.

In my opinion the proper conclusion to be drawn from the whole of the evidence in this case is that the appellant did part with possession of the said premises. The trial Judge was therefore correct in his conclusion that the evidence established a breach of the covenant.

It is submitted by counsel for the appellant that it is unreasonable for the trial Judge to make an order for possession against the appellant. In my view there is no substance in this submission. The appellant had made an application to assign the tenancy and that had been refused by the landlord. Inspite of that the appellant proceeded to sell his business, which involved the possession of the said premises, for a very large sum. There is no evidence that the refusal of the landlords to give their consent was unreasonable. In my view the District Judge was right in his decision to make an order for possession against the appellant.

In the result this appeal fails and is dismissed with costs.

Appeal dismissed.

Solicitors: *Lim Teck Hui & Co.; Kirpal Singh & Co.*

THE "VIRGINIA RHEA";

CHINA STEEL CORP. & ANOR. v. M.V. "VIRGINIA RHEA", OWNERS OF

[A.C.J. (Rajah J.) October 1, 1982]

[Singapore – Admiralty in Rem No. 717 of 1980]

Practice & Procedure – Amendment to Indorsement of Claim on Writ – Amendment to include another bill of lading "KKS33" – Application to set aside – Whether amendment amounted to a new cause of action – Whether it arises out of the same facts as the cause already pleaded – R.S.C. 1970, O. 20 rr. 1 & 5.

This was an appeal from the learned Registrar's decision in which he dismissed the defendants' application to set aside the plaintiffs' amendment without leave dated November 21, 1981 to the Indorsement of Claim on the Writ.